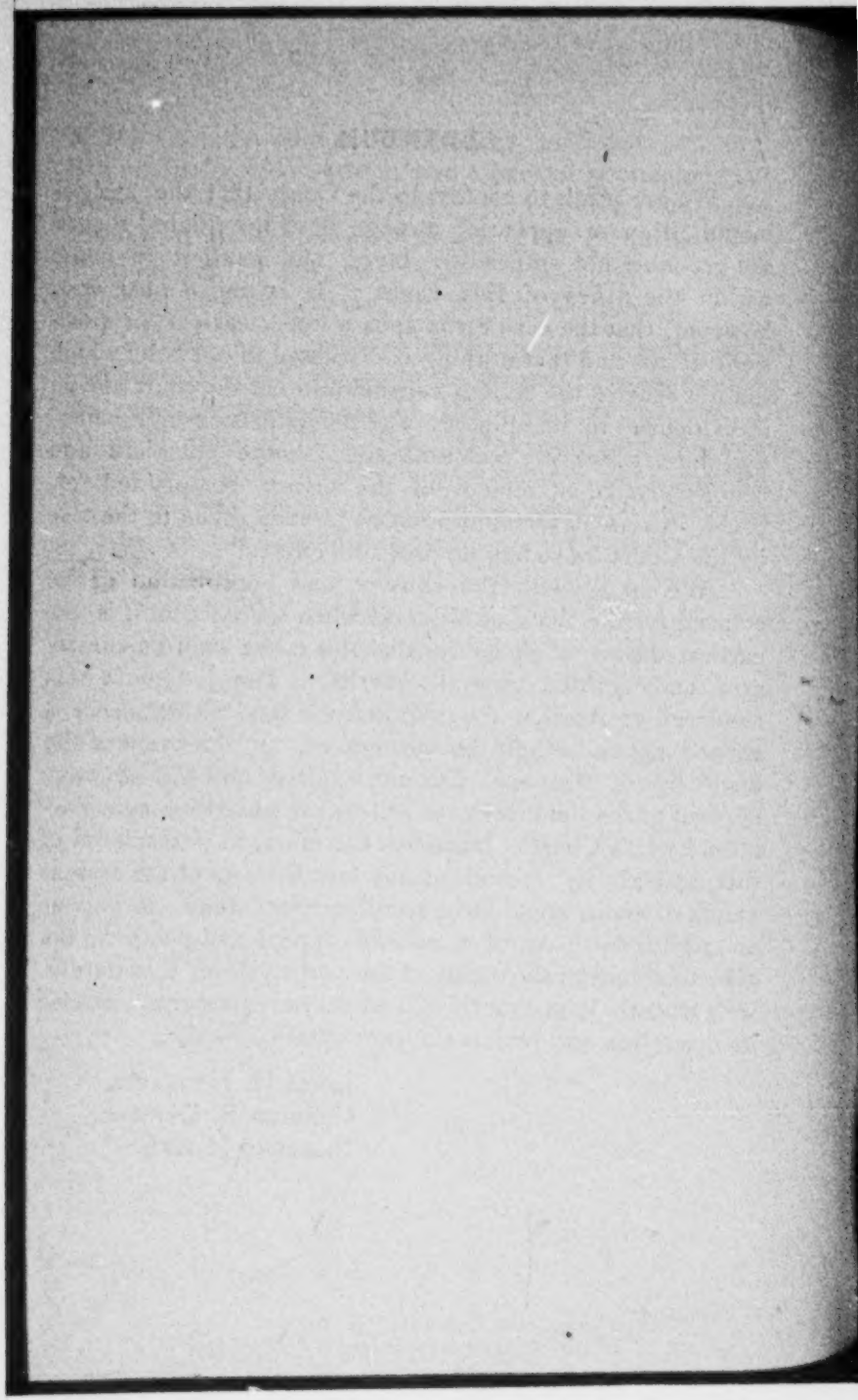

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Supreme Court of the United States

OCTOBER TERM, 1903.

PABST BREWING CO.,
Appellant,
vs.
G. Y. CRENSHAW AND
JOHN J. DOWNEY,
Appellees.

NO. 85.

REPLY BRIEF OF APPELLANT.

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Attorneys for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1903.

PABST BREWING CO.,
Appellant,

vs.

G. Y. CRENSHAW AND
JOHN J. DOWNEY,
Appellees.

NO. 358.

REPLY BRIEF OF APPELLANT.

I.

The Supreme Court of Missouri has never considered the validity of this statute as applied to interstate commerce. In State vs. Bixman, 162 Mo., the application of the act to domestic dealers alone was considered. As related to inspection fees on domestic or intrastate commerce, the Supreme Court of Missouri does not follow the rule announced by this Court in reference to interstate com-

merce, but holds that the fees charged for inspection are not confined to, and need bear no relation to the cost of making such inspection. State vs Bixman, *supra.*

This same principle is applied by that Court to other commodities than liquors as declared in the case cited, page 24, as follows:

"That rule applies to those callings which the state may properly regulate, but has no power absolutely to suppress; but even in the latter case it is not restricted to the mere cost of inspection," citing St. Charles vs. Elsner, 155 Mo., 671.

There has, therefore, been no construction of this statute by the state Court which could in any degree be binding upon this Court. The state Court has declared the act to be an inspection measure, within the proper exercise of the police power of the state as applied to domestic trade. That is all that it has decided.

The federal court, from which this appeal is prosecuted, erroneously adopted the conclusion of the state Supreme Court that the law is an inspection measure, and then erroneously extended its application to interstate commerce. The question then of the interpretation of this statute, and its application to the business of foreign brewers, is one of first impression and open to this Court for final determination.

II.

Our objection to this so-called inspection law is not upon the ground that it is not perfect, or that it is not designed to secure the best results, but that it is wholly lacking in the most ordinary features of inspection measures; that both by its terms and in its practical operation as administered by the state authorities, it accomplishes no

end or object of inspection. It does not even pretend to confine the manufacturer to the use of ingredients which the law says shall be used.

The law is wholly lacking in these three particulars: (1) A method of ascertaining the facts. (2) The right of excluding or preventing the sale of unwholesome beer, or beer not manufactured from these special ingredients. (3) Any power of punishment for the sale of impure or adulterated beer. The entire penal features of the act are confined to a failure to pay the charges prescribed by the act. The description of the statute, therefore, as an inspection law, is a palpable subterfuge and evasion in an attempt to cover up its real purpose as a revenue measure.

III.

In contending that this bill should be construed as a license act, the learned counsel for the state ignore the interpretation put upon it by both the legislature and the state Supreme Court, and by the lower federal court as well, all of whom describe it as an inspection bill. The very terms of the act itself also refute the idea that it is a license measure. It confers no license and no privilege to sell. A man can neither brew beer, nor sell it in the state by complying with this law. A person may, on the other hand, both manufacture and sell without having complied with the law.

The license statutes of Missouri consist of an entirely independent body of legislation, and there is no such relation between them and this act that the latter should be construed in any manner as an amendment to the license laws. It is an entirely independent piece of legislation conceived and enacted for an entirely ulterior purpose than that of conferring the right to manufacture and sell beer. It is enough to say that if the legislature ever had the thought of

making this a license act, it completely forgot its purpose when it came to pass the bill, and there cannot be found even a suggestion of a license within the entire texture of the statute. It is nothing on earth but a cunningly devised revenue measure disguised as an inspection law. But the disguise cannot prevent the Court from throwing aside the mask and penetrating its hidden and real purpose.

To permit this statute to stand as a license measure is to effectually abolish the principle recognized many times by this Court in regard to the inspection of interstate commodities. It is to make the declaration of a purpose, no matter how far-fetched and unsupported by the facts it may be, binding upon this Court. It is to permit the state to say that a statute avowedly passed for one purpose, shall be considered as having been passed for a totally different purpose, and that such declaration must be accepted as binding upon this Court. If this is to be the law, it is certainly new doctrine, and does away with any right of federal control over the question of state interference through inspection laws.

IV.

It is conceded by the state that the fees charged for this inspection bear no sort of relation to the cost, but are grossly excessive, being in fact thirty times the cost. In contending for the right to make this excessive charge for inspection, the learned counsel for appellees fall into two errors: (1) In applying a rule of local law as administered and upheld in Missouri, which we have seen is opposed to the federal law upon the subject; and (2) in applying the law regulating licenses to sell intoxicating liquors.

The argument is in the face of two propositions, abundantly sustained by the decisions of this Court cited in our brief: (1) That in relation to the right of inspection, no distinction exists under the interstate commerce clause of

the Constitution between intoxicating liquors and any other legitimate article of commerce; and (2) that the fee charged for inspection must be based upon the cost of making the same.

V.

The learned counsel for the state are finally driven to the position that this law should be upheld as a specific tax upon beer. In making this contention they fly in the face of the decision of the Supreme Court of the state upon the subject. See State vs. Bixman, p. 24 *et seq.* An examination of the opinion there will show that the Court recognized that under the laws of Missouri, to construe the bill as a tax on beer would be to render the act void. Counsel should not press upon this Court a view of the statute which the Supreme Court of the state has itself recognized as untenable, particularly where counsel appeal to the rule that the state construction must be accepted in this Court.

We cannot believe that this Court will be persuaded by counsel to put a construction on this statute in an effort to uphold it uhder the federal constitution, which, as declared by the state Court would render the act unconstitutional under the laws of Missouri. The act is a revenue measure to be sure. But it is a revenue illegally laid and imposed under a false claim of an inspection law. It is not a direct and specific tax upon beer, such as might be authorized under the laws of Missouri, and this was conceded perforce by the Supreme Court of that state, in order to escape declaring it void under the state constitution.

The Supreme Court of Missouri having held that this was an inspection act, this Court will accept that declaration of the highest Court of the state as being its final opinion of its own state law, and accepting it, will proceed to discuss the same question as thus construed as to its relation to the provisions of the Constitution of the United States.

This exact position has been taken by this Court in the case of C., M. & St. Paul Ry. vs. Minnesota, 134 U. S., 418, (456) where they said, in discussing a position taken by the Supreme Court of Minnesota, with reference to its conflict with the Constitution of the United States:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this Court for the purposes of the present case as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota by the statute that the rates recommended and published by the commission if it proceeds in the manner pointed out by the act are not simply advisory nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that under the statute the rates published by the commission are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and that in a proceeding for a *mandamus* under the statute there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the Railroad Company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that so construed it conflicts with the Constitution of the United States," etc., etc.

So here the Supreme Court of Missouri having solemnly declared that the act of the legislature in question is an inspection act only, and not a tax upon beer, this Court will accept that construction, for the purpose of the present case as conclusive, and not to be re-examined here as to its

propriety or accuracy. And this being the construction of the statute by the Supreme Court of Missouri, it is binding here upon this Court, and accepting it as the basis of judicial interpretation by the Supreme Court of Missouri, this Court will proceed to consider whether so construed by the highest court of that state it conflicts with the interstate commerce provisions of the Constitution of the United States.

But this act bears no analogy to any acts conferring the right of taxation upon an interstate product after it shall have become mingled with the general mass of property in the state. With respect to such right, no question is made by these brewers, and unquestionably they are paying now their full quota of state and municipal taxes. This bill will either have to be upheld as being what it has been declared to be by the legislature, by the Supreme Court of Missouri, and by the United States circuit court for the western district of that state, namely, a proper inspection law, or it will have to be declared void. It unquestionably is to be tried by the rules relating to the inspection of commodities. It is not a tax bill within the meaning of the authorities which have sustained taxes, and to call it a tax bill, or to construe it as such would by no means help the position of the state here.

The charge is made, as provided by section eight of the act: "for inspection and gauging," and "for labeling each package." To define this as a tax bill would involve the same inconsistency which we have heretofore pointed out, namely, of making the validity of a bill depend on what might be said to be its purpose, rather than on what it actually means and accomplishes. If this can be the law, then it furnishes an easy and safe way for future legislatures to override the decisions of this Court concerning inspection laws, by calling such charges a tax. Under that principle, the case of Postal Telegraph Company vs. Taylor, 192 U. S., and cognate decisions of this Court were wrongly decided,

criminal prosecutions in each one of the counties of the state, and each sale under the law would constitute an independent violation of the law.

The suit then is brought against the appellees whose sole color of right is an unconstitutional statute, to enjoin them, under claim of such law, from interfering with the appellant in the shipment of its products from other states into the state of Missouri and disposing of them there in accordance with the valid laws of that state, and under its license to do business in that state.

None of the federal decisions cited by counsel for the appellees support their contention against the right to maintain the action. The case falls exactly within the decision of the Court in Vance vs. Vandercook Company, 170 U. S. 438, where a similar bill was sustained. The forfeiture prescribed by section ten of the statute, of the license and authority of the brewers to do business in the state, by way of punishment for violation of this statute, of course would amount to a destruction of its business in Missouri. As said in Minneapolis Brewing Co. vs. McGillivray, 104 Fed., 270, cited by appellees:

"There might be a recovery for a seizure of the warehouse, but the damage resulting from the destruction of the plaintiff's business could not be compensated in an action at law."

The Court further says in that same case, p. 270:

"The jurisdiction of the Court to restrain the officers of this state in the enforcement of an unconstitutional statute is well established, citing Regan vs. Trust Co., 154 U. S., 389; Pennoyer vs. McConnaughy, 140 U. S., 1."

In the later case of Davis & Farnum Mfg. Co. vs. Los Angeles, 189 U. S. 207, it seems to us that the Court stated the exception to which this case belongs:

"That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a

party to a suit already pending before it and to try the same right that is in issue there, or to prohibit the invasion of the rights of property or the enforcement of an unconstitutional law," was so fully construed and settled in an elaborate opinion by Mr. Justice Gray, *in re* Sawyer, 124 U. S. 200, that no further reference to prior authorities was deemed necessary.

Here we repeat, this is not a suit to enjoin or stay criminal proceedings. None were instituted. It is a suit to prohibit the invasion of the rights of property of the appellant by the enforcement of an unconstitutional law.

In Vicksburg Water-works Co. vs. Vicksburg, 185 U. S. 66, it was declared by this Court:

"It is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury where the damages would be insufficient or irreparable; and the exercise of such jurisdiction is for the benefit of both parties in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

We therefore submit, in reference to this abandoned contention of appellees, now sought to be renewed in this Court, that the bill was well founded; that complainant had no adequate remedy at law, and was entitled to the relief invoked in a court of equity.

VII.

An examination of the brief of the learned counsel for appellees in connection with the opinion of the lower court printed in the record, discloses that the positions taken there, and upon which the judgment was made to rest, are abandoned here. A further comparison of the positions of

counsel in their brief here, with the opinion of the Supreme Court of the state of Missouri to which they advert, shows that they have even shifted their position from the grounds upon which that opinion was predicated. There the Court industriously refuted any contention that the law was a tax measure and placed its decision squarely upon the proposition that it was an inspection law within the power of the legislature to pass. It was forced to thus distinguish the statute from a tax measure in order to uphold it, under the sanctities and safeguards of even the state constitution. Notwithstanding the appeal of the learned counsel for appellees to the supposed binding force upon this Court of this judicial pronouncement from Missouri, we none the less find that the most serious argument put forward by them to uphold the legislation is based upon the claim that it is a tax.

While we do not presume to criticise counsel for changing front in a law suit, we may be pardoned the suggestion that something must be wrong with a law which requires so many changes of position to uphold it; particularly when neither the Federal, nor State Court nor the Law Department of the state can get together upon any common ground.

Respectfully submitted.

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Attorneys for Appellants.

Kansas City, Mo., November 29, 1904.